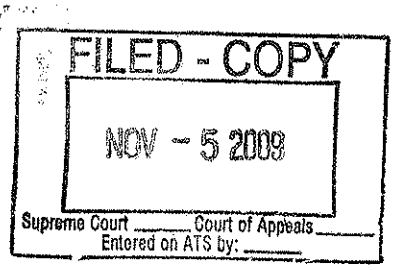
11-5-2009

State v. Two Jinn, Inc. Respondent's Brief Dckt. 36629

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. AARON KYLE HARRIS, Defendant, TWO JINN, INC., a real party in interest, Appellant.	Supreme Court Case No. 36629 Kootenai County Case No. CR-2005-2408-M



RESPONDENT'S BRIEF ON APPEAL

Appeal from the District Court of the
First Judicial District for Kootenai County

♦

HONORABLE JOHN T. MITCHELL
Presiding Judge

♦

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

IDAHO CASES

UNITED STATES SUPREME COURT CASES

CASES FROM OTHER JURISDICTIONS

STATUTES AND RULES

I.

STATEMENT OF THE CASE

A. Nature of the Case

Appellant Two Jinn, Inc. ("Two Jinn") appeals from the district court's order affirming the magistrate's denial of Two Jinn's Motion to Set Aside Forfeiture and Exonerate Bond ("Motion to Exonerate Bond.")

B. Course of Proceedings and Statement of Facts

With the following minor exceptions, the State of Idaho agrees with Two Jinn's statement of the General Course of Proceedings. Opening Brief of Appellant ("Appellant's Brief"), pgs. 1-3. The State disagrees with Two Jinn's assertion that it "lacked any legal recourse to return Mr. Harris to Idaho involuntarily." Id. at 2. The State additionally notes that the hearing before the magistrate on Two Jinn's Motion to Exonerate Bond was held on October 31, 2008, rather than October 11, 2008. See Appellant's Brief, pg. 3; Tr. (10/31/08);[1] R. 140-42.

II.

ISSUES PRESENTED ON APPEAL

A. Did the magistrate abuse his discretion in denying Two Jinn's Motion to Exonerate Bond by determining that justice did not require exoneration of the bond?

B. Did the magistrate abuse his discretion in denying Two Jinn's Motion to Exonerate Bond by determining that the doctrine of impossibility did not require exoneration of the bond?

[1] The transcript of the October 31, 2008 hearing is an exhibit to the record in this case.

III.

ARGUMENT

A. Introduction

The magistrate appropriately exercised his discretion in denying Two Jinn's Motion to Exonerate Bond, and the district court correctly affirmed the magistrate's well-reasoned decision on intermediate appeal. As discussed in detail below, the magistrate was within the bounds of his discretion in concluding that justice did not require exoneration of the bail bond at issue in this case and that the doctrine of impossibility did not warrant exoneration of the bond. Accordingly, the State of Idaho respectfully requests that this Court affirm the district court's order upholding the magistrate's denial of Two Jinn's Motion to Exonerate Bond.

B. Standard of Review

This Court recently articulated the applicable standard of review as follows:

> "On appeal of a decision rendered by a district court while acting in its intermediate appellate capacity, this Court directly reviews the district court's decision." In re Doe, 147 Idaho 243, 207 P.3d 974, 979 (2009). However, to determine whether there was an abuse of discretion, the Court independently examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008). "If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we [will] affirm the district court's decision as a matter of procedure." Losser v. Bradstreet, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008) (quoting Nicholls v. Blaser, 102 Idaho 559, 561, 633 P.2d 1137, 1139 (1981)).

Crump v. Bromley, __ P.3d __, 2009 WL 3415745, *1 (Idaho 2009); see also Montgomery v. Montgomery, 147 Idaho 1, 205 P.3d 650, 654 (2009) ("When this Court reviews a decision rendered by a district court acting in its appellate capacity, it considers the trial court's

[magistrate's] decision, and if that decision is free from error and if the district court affirmed that decision, we affirm the district court's decision as a matter of procedure.")

C. The Magistrate Did Not Abuse His Discretion in Denying Two Jinn's Motion to Exonerate Bond by Determining that Justice Did Not Require Exoneration of the Bond

At the time of Two Jinn's Motion to Exonerate Bond in this matter, Idaho Criminal Rule 46(e)(4)[2] provided that the trial court could set aside the forfeiture and exonerate the bond "if it appears that justice does not require a forfeiture's enforcement." I.C.R. 46(e)(4). The decision whether to set aside a forfeiture or exonerate a bond pursuant to Rule 46(e)(4) is within the trial court's discretion. State v. Rupp, 123 Idaho 1, 3, 843 P.2d 151, 153 (1992); State v. Fry, 128 Idaho 50, 54, 910 P.2d 164, 168 (Ct. App. 1994). As the Idaho Court of Appeals has articulated: "In Idaho, it has long been held that the 'fixing of bail and release from custody are traditionally within the discretion of the courts. We believe that these matters are most wisely left to the trial judge.'" Fry, 128 Idaho at 53, 910 P.2d at 167 (quoting State v. Currington, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985)).

A review by this Court of the magistrate's exercise of discretion involves consideration of whether the magistrate: "(1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached [his] decision by an exercise of reason." Shore v. Peterson, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009). The Idaho courts have recognized several factors – known as "the Fry factors" – that the trial court can consider in reaching its discretionary determination of whether a bond should be forfeited:

> (1) the willfulness of the defendant's violation of bail conditions; (2) the surety's participation in locating and apprehending the defendant; (3) the costs,

[2] A new version of Rule 46 became effective July 1, 2009. However, the prior version of Rule 46 applies to the case at hand, as Two Jinn filed its Motion to Exonerate Bond in 2008. R. 106-21.

> inconvenience, and prejudice suffered by the state as a result of the violation; (4) any intangible costs; (5) the public's interest in ensuring a defendant's appearance; and (6) any mitigating factors.

Fry, 128 Idaho at 54, 910 P.2d at 168; see also State v. Quick Release Bail Bonds, 144 Idaho 651, 655, 167 P.2d 788, 792 (Ct. App. 2007). However, "the Fry factors are not all-inclusive," as "[a] trial court may give weight to other relevant factors." Quick Release Bail Bonds, 144 Idaho at 655, 167 P.2d at 792.

1. The Magistrate Appropriately Exercised His Discretion in Denying Two Jinn's Motion to Exonerate Bond

In the case at hand, the magistrate appropriately exercised his discretion in reaching his decision to deny Two Jinn's Motion to Exonerate Bond. First, the magistrate "perceived the issue as one of discretion." Shore, 146 Idaho at 915, 204 P.3d at 1126. The magistrate specifically noted: "In this case, the Court has some discretion. It is not automatic that a bond will be forfeited forever. There are certain circumstances where the Court has the ability to set aside that bond . . . and exonerate it." Tr. (10/31/08), pg. 7, lns. 5-11; see also Tr. (5/27/09), pg. 14, lns. 13-15.

The magistrate then proceeded to "act[] within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to [the magistrate]," and "reached [his] decision by an exercise of reason." Shore, 146 Idaho at 915, 204 P.3d at 1126; Tr. (10/31/08), pgs. 4-10. A review of the transcript of the hearing on Two Jinn's Motion to Exonerate Bond reveals that the magistrate's decision was well-reasoned and involved consideration of the Fry factors: the willfulness of the Defendant's violation of bail conditions, (Tr. (10/31/08), pg. 4, ln. 19 - pg. 5, ln. 21); the surety's participation in locating and apprehending the defendant, (id. at pg. 4, lns. 7-12); inconvenience suffered by the state as a result of the violation, (id. at pg. 4, lns. 13-14); intangible costs, (id. at pg. 7, lns. 12-17); the

public's interest in ensuring a defendant's appearance in court, (id. at pg. 5, lns. 11-21; pg. 7, ln. 14 - pg. 8, ln. 9); and any mitigating factors. Id. at pg. 8, lns. 10-19; see also Tr. (5/27/09), pg. 14, ln. 12 - pg. 16, ln. 10; Fry, 128 Idaho at 54, 910 P.2d at 168. Substantial and competent evidence supported the magistrate's findings of fact, and the magistrate's conclusions of law followed from those findings of fact. Crump, __ P.3d __, 2009 WL 3415745, *1.

Two Jinn, however, attempts to attack the magistrate's well-reasoned decision with three general arguments: (1) Two Jinn asserts that the magistrate "applied the incorrect legal standard;" (2) Two Jinn argues that "both the magistrate and the district court erroneously believed that Two Jinn could request extradition" of the defendant, Aaron Harris, from Oregon; and (3) Two Jinn asserts that the magistrate failed to recognize the purpose of bail by finding that exoneration of the bond was not warranted. Appellant's Brief, pgs. 6-10. Each of these arguments is addressed below.

2. The Magistrate Applied the Correct Legal Standard

As noted above, Two Jinn first argues that the magistrate abused his discretion in denying Two Jinn's Motion to Exonerate Bond because, according to Two Jinn, the magistrate "applied the incorrect legal standard." Appellant's Brief, pg. 6. Specifically, Two Jinn argues that the magistrate "denied Two Jinn's motion because it concluded Two Jinn failed to demonstrate that 'it would . . . not be just to let the forfeiture stand,'" which Two Jinn asserts was the "incorrect legal standard." Id. at 6-7 (quoting Tr. (10/31/2008), pg. 9, lns. 4-5).

a. *Two Jinn Failed to Raise This Issue Below*

This argument first fails because it was not raised before the district court below. See Appellant's 3/23/09 Brief; Appellant's 5/8/09 Reply Brief.[3] "It is well settled that when a second

[3] Appellant's 3/23/09 Brief and Appellant's 5/8/09 Reply Brief are exhibits to the record in this appeal. See R. 182.

appeal is taken, the appellants may not raise issues in the higher court different from those presented in the intermediate court." Centers v. Yehezkely, 109 Idaho 216, 217, 706 P.2d 105, 106 (Ct. App. 1985). "Generally, 'an issue presented on appeal must have been properly framed and preserved in the court below.' It follows that after an intermediate appeal, issues not raised in the intermediate court will not be addressed in the higher court." Wood v. Wood, 124 Idaho 12, 16-17, 855 P.2d 473, 477-78 (Ct. App. 1993) (quoting Centers, 109 Idaho at 217, 706 P.2d at 106); see also Cooper v. Bd. of Prof'l Discipline of Idaho State Bd. of Med., 134 Idaho 449, 456, 4 P.3d 561, 568 (2000). Two Jinn did not argue, in its intermediate appeal before the district court, that the magistrate had "applied the incorrect legal standard" in reaching his discretionary determination. See Appellant's 3/23/09 Brief; Appellant's 5/8/09 Reply Brief. Because this particular argument was not "properly framed and preserved in the court below," it should not be addressed by this Court. Wood, 124 Idaho at 16-17, 855 P.2d at 477-78 (quoting Centers, 109 Idaho at 217, 706 P.2d at 106).

b. *The Magistrate Applied the Correct Standard*

Regardless, however, the magistrate's determination was consistent with applicable legal standards. Two Jinn's argument is based upon semantics rather than substance: Two Jinn claims that the magistrate "denied Two Jinn's motion because it concluded Two Jinn failed to demonstrate that 'it would . . . not be just to let the forfeiture stand,'"[4] as compared to Rule

[4] The magistrate's actual comments were as follows:

> I do not find that the mere fact that the defendant is unwilling to return to Oregon [sic] and the mere possible threat of being charged with a crime in Oregon creates a legal impossibility such that it would be – not be just to let the forfeiture stand.

Tr. (10/31/08), pg. 9, lns. 1-5.

> And I don't find that because they have placed themselves in that situation, in this particular case, that it makes it unjust to . . . not forfeit the bond.

46(e)(4)'s language, which provided that the trial court could set aside the forfeiture and exonerate the bond 'if it appears that justice does not require a forfeiture's enforcement.'" Appellant's Brief, pgs. 6-7 (quoting I.C.R. 46(e)(4)); Tr. (10/31/08), pg. 9 lns. 4-5.) The magistrate's consideration of whether "it would be unjust to allow the bond to remain forfeited" is the same as whether "justice does not require a forfeiture's enforcement." Tr. (10/31/08), pg. 7, lns. 9-10; I.C.R. 46(e)(4). When considering this issue, the trial court can reach one of two conclusions; either: (1) justice requires the forfeiture's enforcement; or (2) justice does **not** require the forfeiture's enforcement, which would therefore render enforcement of the forfeiture "unjust." The magistrate's consideration of whether allowing the bond to remain forfeited would be unjust was the correct legal standard, and the magistrate did not act inconsistently with applicable legal standards.

3. The Magistrate Did Not Abuse His Discretion in Considering Whether Two Jinn Demonstrated that it Had Taken Steps to Seek Extradition

Two Jinn additionally argues that the magistrate abused his discretion in denying Two Jinn's Motion to Exonerate Bond because, according to Two Jinn, the magistrate "erroneously believed that Two Jinn could request extradition." Appellant's Brief, pg. 7. Two Jinn's assertion overstates the magistrate's holding, which was as follows:

> I do not find that the mere fact that the defendant is unwilling to return to Oregon [sic] and the mere possible threat of being charged with a crime in Oregon creates a legal impossibility such that it would be – not be just to let the forfeiture stand.
>
> There are ways to secure the attendance in the State of Idaho of somebody who's charged with a misdemeanor. There's nothing before me that **anybody** has ever taken any of those steps. You can invoke the extradition powers of the states on a misdemeanor, as well. It is very rarely done. But here there's been no efforts by **anybody** that I have seen to try and invoke that process to see if Mr. Harris can be brought back through the cooperative efforts of the Governor's Office of the State of Idaho and the Governor's Office of the State of Oregon.

Id. at 10, lns. 15-18.

Tr. (10/31/08), pg. 9, lns. 1-15 (emphasis added).

The magistrate never held that Two Jinn itself "could request extradition" from the Governor's Office of the State of Oregon. See id. Instead, the magistrate merely noted that there was no evidence from Two Jinn that either Two Jinn or anybody else had taken any steps to "try and invoke the process." Id. at pg. 9, ln. 12. Indeed, as discussed at oral argument during the intermediate appeal before the district court, there was no evidence that Two Jinn took any measures to request that the Prosecutor's Office seek extradition of Mr. Harris.[5] See Tr. (5/27/09), pgs. 9-13. In fact, Two Jinn did not even notify the prosecuting attorney that it had discovered Mr. Harris in Oregon; the first time Two Jinn disclosed the information was through its filing of its Motion to Exonerate Bond. Id. at pg. 9, lns. 1-10. Thus, Two Jinn sought exoneration of the bond without having even taken prior steps to notify the Prosecutor's Office of its knowledge of Mr. Harris's whereabouts. Id.

Two Jinn has argued that "[t]he magistrate . . . incorrectly weighed the state's failure to seek Mr. Harris's extradition against Two Jinn instead of applying that factor in its favor." Appellant's Brief, pg. 10. While the Idaho courts have, indeed, held that a trial court can consider the state's interest in extraditing the defendant when reaching its discretionary determination regarding the exoneration of a bond, the magistrate's conclusion was within the bounds of his discretion. It was not an abuse of discretion for the magistrate to consider the

[5] Pursuant to Idaho Code § 19-4523(2), the prosecuting attorney can apply to the Governor of Idaho for extradition to Idaho of an individual who has violated his bail or probation. If the prosecuting attorney has no knowledge that the individual has fled the State of Idaho, however, then clearly such an application will not be made. As the State's attorney noted before the district court in this matter: "[I]n this case I think that the bonding company, if they did have . . . an extraordinary circumstance in this case, that being that the defendant was located in Oregon, a state where they're unable to bring him back, at that point finding him there, perhaps it would've been on the bonding company that at that time indicate that they'd found him in a place where they couldn't bring him back to Idaho, and at that point then make the request for that warrant of extradition . . .." Tr. (5/27/09), pg. 9, ln. 16 - pg. 10, ln. 1.

potential mitigating factor of the difficulty of extradition and to reach a well-reasoned rejection of that excuse, based in part upon Two Jinn's lack of any efforts to try to invoke the extradition process through the means available to Two Jinn, such as timely notification of the prosecutor and/or requesting that the prosecutor apply to the Governor for extradition. See Tr. (10/31/08), pg. 9, lns. 1-15; Tr. (5/27/09), pgs. 9-13.

In addition to its consideration of Two Jinn's lack of action in requesting extradition, the Court also considered Two Jinn's assumption of risks and obligation to secure the defendant's presence in court. As discussed in more detail below, this appropriate focus on the surety's risks and obligations further supported the magistrate's conclusion that justice did not require exoneration of the bond, despite Mr. Harris's presence in Oregon.

4. The Magistrate Appropriately Considered the Underlying Purpose of Bail Bonds

Two Jinn's final argument with respect to the magistrate's alleged abuse of discretion in determining that justice did not require exoneration of the bond is that the magistrate "failed to recognize the policies underlying relief from forfeiture, including fulfilling bail's purpose by providing the surety a financial incentive to locate absconding defendants." Appellant's Brief, pg. 10. The State disagrees that the purpose of a bail bond is to provide a surety with a financial incentive to **locate** a fugitive. Taking a photograph of the fugitive in another state does not effectuate the purpose of securing the defendant's presence in court. To the extent that the bail bond is intended to provide an incentive for any behavior on the part of the surety, it is instead intended to encourage the surety to **return** the defendant himself to court. Two Jinn predicts that if the Court rules against it in this case, "bail agents such as Two Jinn will no longer undertake the expense to find defendants who have fled Idaho – particularly those who have fled to neighboring Oregon . . .." Appellant's Brief, pg. 10. In other words, Two Jinn will not longer

locate a defendant, fail to inform the prosecution or any entity that can actually extradite the defendant, and then demand that the trial court exonerate the bond for its extraordinary efforts in having failed to accomplish the primary purpose of the bond: to return the defendant to court.

Two Jinn suggests that the magistrate failed to focus on the appropriate policy reasons and/or purposes underlying bail bonds. To the contrary, the magistrate appropriately considered the primary purpose of bail bonds, which Two Jinn itself recognized: "to effectuate the accused's appearance in court," and appropriately focused on Two Jinn's assumption of risks and obligations under the bond contract. Id. at 8 (citing to Quick Release Bail Bonds, 144 Idaho at 655, 167 P.3d at 792.)

The magistrate reasoned:

> Here, however, what I find is that the bonding company took a risk. They're in the business of posting surety bonds to ensure that people appear at future court appearances.
>
> I have no evidence of what efforts, if any, the bonding company may have done or taken to secure or to ensure that their client was not going to fly the coop. Was going to cooperate as far as appearing at all of their court appearances.
>
> That is exactly why we have a surety bond arrangement. And so that there is some guarantee that a person is going to appear at all of their court appearances. That is the exact obligation that the bonding company assumes when they post a surety bond for a criminal defendant.
>
> Obviously, no bonding company is going to assume the total responsibility for supervising the client 24 hours a day, seven days a week to make sure that they don't do anything silly. *But they do have an obligation to bring that person to the* court. And the bonding company failed in that obligation.
>
> They now claim that it's impossible because they may face criminal prosecution in another state. And while that may occur, that, too, is a risk that the bonding company takes when they bond somebody out and they're going to do business in this particular geographical region. If somebody is going to flee the area, whether it is to Oregon, or Alaska, or Northern Ireland, or wherever[,] a person may decide that they don't [want] to come back. In which case there are some practical difficulties and some legal difficulties.

> But that is not the responsibility or obligation of the State of Idaho or of the Public Defender appointed to represent Mr. Harris. That is the commercial responsibility of the surety bond company.

Tr. (10/31/08), pg. 7, ln. 14 - pg. 8, ln. 23.

While the exact issue presented in this case does not appear to have been previously examined by the Idaho courts, the magistrate's reasoning was in accordance with many other jurisdictions that have addressed similar scenarios. In fact, the United States Supreme Court has long held that a surety should not be automatically relieved of its obligations simply because the defendant flees the jurisdiction:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' . . . **They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee.**
>
> In the case of *Devine* v. *The State*, the court, speaking of the principal, say, 'The sureties had the control of his person; **they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded. . . . In the case before us, the failure of the sureties to surrender their principal, was, in the view of the law, the result of their own negligence or connivance, in suffering their principal to go beyond the jurisdiction of the court and from under their control.**'

Taylor v. Taintor, 83 U.S. 366, 371-72 (1872) (*emphasis added*).

> A bail bond is a three-party contract between the state, the accused, and the surety, whereby **the surety guarantees appearance of the accused**. The risk of a defendant not appearing is borne by the surety and the surety, in order to protect its interest, **must take precautionary actions** to prevent this type of situation. . . .

> apprehend and produce appellant for trial as the bond obligated it to do were immaterial to the matter of forfeiting the bond and the rendition of a judgment against the surety for the penalty of it.

State v. Honey, 86 N.W.2d 187, 189-90 (Neb.1957) (emphasis added).

Similarly, another court held:

> She contends that her principal was prevented from making his appearance in the Court below **by reason of the failure of North Carolina, the obligee, to assert its right to his custody. The position is untenable**. Upon the execution of the bail bond, William Dudley Pelley was delivered into the custody of his sureties. **The very purpose of the bond was not to enrich the treasury of Buncombe County, but to make the sureties responsible for the appearance of the defendant at the proper time**. In the case of United States v. Marrin, supra, the defendant was released on a bail bond for his appearance in the District Court of the United States for the Eastern District of Pennsylvania. While Marrin was out on bond he went to New York, where he was arrested, convicted upon charges of forgery and grand larceny and sentenced to a term of imprisonment of fifteen years in Sing Sing. The surety on the bail bond in Pennsylvania raised the same question as to the duty of the United States Court to have requested the custody of the principal. The Court said: "Though the United States attorney was present at the hearing, his failure to request Marrin's release was no such act of the obligee as to relieve the surety, because non constat that the request would have been granted by the court. It was Marrin's own act in going into that jurisdiction that rendered his appearance impossible. **Our attention has not been called to any case holding that under any circumstances the prosecuting attorney of a district in which the recognizance runs is required to make an effort to secure the removal or release of an alleged criminal arrested in another jurisdiction. He may do so, but he is not required to act.** The recognizance is taken to secure that very result. Its condition is absolute in this regard, and, in our judgment, **it would be a very dangerous innovation to require the government to not only see to it that responsible bail is secured, but, in addition, require it to keep its prosecuting officers in readiness to appear in other and distant jurisdictions to aid the principal in the recognizance to extricate himself from an arrest from which alone the latter is to blame.**"

State v. Pelley, 24 S.E.2d 635, 638 (N.C. 1943) (quoting United States v. Marrin, 170 F. 476 (E.D. Pa. 1909)); see also County of Los Angeles v. Ranger Ins. Co., 56 Cal.Rptr.2d 25, 28 (Cal. Ct. App. 1996) ("Cuba was just one of many places which defendant could flee to and be immune from surety's agents. Such risks were present when surety posted bond. Respondent did not *act* to increase those risks.")

Two Jinn further suggests that the magistrate abused his discretion in focusing on the risks assumed by Two Jinn under the bond agreement, as the magistrate concluded that justice did not require forfeiture of the bond on the mere basis that "the bonding company hadn't secured enough collateral, or co-signers, or any other security regarding the obligations," noting: "[T]hat's the bond company's responsibility. That's their obligation," and "if the bonding company makes the decision that they have not adequately secured the bond, that's their risk." Tr. (10/31/08), pg. 10, lns. 7-14. This conclusion on the part of the magistrate was well within the bounds of his discretion. The magistrate focused on the very terms of the contract to which Two Jinn contractually agreed; to suggest that it was an abuse of discretion for him to do so is untenable. Indeed, other courts have come to the same appropriate conclusion as the magistrate in this case:

> **The escape of a defendant is the business risk of a bail surety**. It is precisely the situation which a surety guarantees against. Appellant insured the risk by securing property of the defendant. **The fact that appellant is now unable to deliver the defendant or fully collect on his collateral will not shift the risk to the obligee**. We hold, therefore, that **it is an insufficient defense in a bond forfeiture proceeding that appellant is unable to produce the defendant due to foreign policy decisions when the defendant voluntarily fled the country prior to his initial court appearance date.**

State v. Ohayon, 467 N.E.2d 908, 911-12 (Ohio Ct. App. 1983) (emphasis added).

> "Sureties know and solemnly contract that the defendant shall appear and abide the orders of the court and in the event of his default are bound by their obligation. . . . **If sureties, who have it in their power to insure compliance by a defendant, may be relieved because they make diligent effort for his arrest as a fugitive there exists little inducement for diligence on their part in the first instance to prevent his escape. To exonerate sureties for such reason would seriously impede the declared public policy of the State for the prevention and punishment of crime. . . .**"
>
> Other reasons for denying relief to the surety are these: . . . the removal of the principal to Oklahoma and his falling into the toils of the law of that state are **the**

> Surety's inability to perform its obligation is **due to its own fault in permitting the defendant to leave the State** . . ..

Allegheny Cas. Co. v. State, 850 So.2d 669, 671 (Fla. Dist. Ct. App. 2003) (emphasis added).

Two Jinn's suggestion that the magistrate's decision ignores the underlying purpose of bail bands because the "refus[al] to exonerate the bond in these circumstances rewards the state's lack of interest in extraditing Mr. Harris with a windfall of the forfeiture funds in its treasury" is untenable. Appellant's Brief, pg. 8. First, as discussed previously, there is no indication in the record that the state displayed a "lack of interest in extraditing Mr. Harris," as Two Jinn never requested that the state pursue extradition, and as the state was not even aware of Mr. Harris's presence in Oregon until after Two Jinn filed its Motion to Exonerate. See id.; Tr. (5/27/09), pgs. 9-13. Regardless, however, it was not an abuse of the magistrate's discretion for him to focus on **Two Jinn's** contractual obligations and assumed risks with respect to the bail bond, rather than shifting his focus to the alleged actions of a third party.

As a Nebraska court articulated in a similar situation:

> **It was not important that Nebraska officers did not assist the surety in its attempt to secure the return of appellant. They had no duty to do so.** Their refusal was not an interference with or an obstacle to the performance of the obligation of the surety as provided in the bond.
>
> . . . It is stated in United States v. Marrin, D.C., 170 F. 476-478: 'It is contended his failure to appear resulted from the failure of the United States district attorney to urge Judge Chatfield to release him. Upon entering into the recognizance Marrin was delivered into the custody of his surety, who was thereafter responsible for his appearance. **Upon this contract the government had a right to rely, and it is not required to go out of the jurisdiction in which the recognizance was given to help the cognizor to extricate himself from a situation in which he of his own motion became entangled.**'
>
> **The responsibility to have appellant in court when his presence was required was solely that of the surety.** The essence of the complaint of the surety is that the officers did not do or assist in doing what the bond required of the surety. There is no showing that the officers or the State did anything to interfere with performance by the surety. The facts in reference to the efforts of the surety to

> **result of defendant's own voluntary act; the surety is at fault for permitting him to go into another jurisdiction, instead of keeping him under its control . . ..**

State v. Hammond, 426 S.W.2d 84, 87 (Mo. 1968) (quoting State v. Hinojosa, 271 S.W.2d 522, 524 (Mo 1954)); see also Umatilla County v. Resolute Ins. Co., 493 P.2d 731, 733 (Or. Ct. App. 1972) ("The state is not the surety's surety. We have not been cited to any provision . . . that says that the surety shall not be answerable on its bond unless the state takes some positive action to insure that the surety's principals will meet their unqualified obligation to appear at the appointed time.")

Two Jinn additionally argues that "public policy disfavors forfeitures." Appellant's Brief, pg. 4. The Idaho law cited by Two Jinn on this point holds only that a magistrate's decision not to forfeit a bond was within his discretion and "consistent with the policy disfavoring forfeitures." State v. Abracadabra Bail Bonds, 131 Idaho 113, 117-18, 952 P.2d 1249, 1253-54 (Ct. App. 1998). Equally (if not more) compelling is the public policy disfavoring a defendant's failure to appear in court, which is the primary purpose underlying a bail bond contract, as well as the public policy favoring the enforcement of contractual obligations, such as Two Jinn's contractual obligation to effectuate the defendant's appearance in court. See, e.g., Burley Newspapers, Inc. v. Mist Pub. Co., 90 Idaho 515, 414 P.2d 460, 462-63 (1966) ("It would be both inequitable and against public policy of this state to permit one party to a contract, voluntarily made, to seek relief from an executed contract after receiving the benefits thereunder and not permit the other party similarly to enforce the contractual obligations."); Stearns v. Williams, 72 Idaho 276, 283, 240 P.2d 833, 837 (1952) ("An agreement voluntarily made between competent persons is not lightly to be set aside on the grounds of public policy, or because it turned out unfortunately for one party."); Marshall v.

Covington, 81 Idaho 199, 205, 359 P.2d 504, 507 (1959) ("We do not so far forget that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape their obligation on the pretext of public policy . . .") (quoting Granger v. Craven, 199 N.W. 10, 11 (Minn. 1924).)

In sum, as one court aptly articulated: "**The purpose of a bail bond is to have the principal appear at a prescribed time**. The fact that his presence may subsequently be obtained through extradition cannot eliminate the prejudice to the state which must be presumed as a result of the delay in bringing him to trial. Since the surety failed to perform its obligation, it must be held liable upon its undertaking." Pinellas County v. Robertson, 490 So.2d 1041, 1043 (Fla. Ct. App. 1986) (emphasis added). The magistrate appropriately considered the underlying purpose of bail bonds and reached a well-reasoned decision well within the bounds of his discretion.

D. The Magistrate Did Not Abuse His Discretion in Denying Two Jinn's Motion to Exonerate Bond by Concluding that the Doctrine of Impossibility Did Not Require Exoneration

Two Jinn additionally argues that "because Oregon law and the state's lack of interest in prosecuting Mr. Harris made it impossible for Two Jinn to bring him before the court, the doctrine of impossibility should excuse Two Jinn's performance under the bail bond agreement." Appellant's Brief, pg. 11.

As this Court has stated: "[T]he doctrine of impossibility operates to excuse performance when the bargained-for performance is no longer in existence or is no longer capable of being performed due to the unforeseen, supervening act of a third party." Haessly v. Safeco Title Ins. Co. of Idaho, 121 Idaho 463, 465, 825 P. 2d 1119, 1121 (1992).

> Impossibility is proven by showing that a contingency occurred, the nonoccurrence of which was a basic assumption of the agreement, and that the

> contingency made performance of the contract impossible. It is not sufficient to show that the performance simply became more difficult or more expensive than anticipated-it must have been made impossible. Most importantly, it is the task itself which must be impossible-it is not enough that the particular promisor is unable to perform the task if it would be possible for a different promisor to perform.

State v. Chacon, 146 Idaho 520, 523, 198 P.3d 749, 752 (Ct. App. 2008) (internal citations omitted).

Two Jinn's attempt to rely upon the doctrine of impossibility fails on several fronts. First, the contingency of Mr. Harris fleeing the jurisdiction cannot be deemed an "**unforeseen**, supervening act;" nor has Two Jinn demonstrated that Mr. Harris's continued presence in Idaho "was a basic assumption of the [bond] agreement." Haessly, 121 Idaho at 465, 825 P. 2d at 1121 (emphasis added); Chacon, 146 Idaho at 523, 198 P.3d at 752. There is no evidence on the record that Two Jinn's obligations to ensure Mr. Harris's appearance in court were only valid so long as Mr. Harris remained in Idaho. Likewise, a criminal defendant's decision to flee to another state or country is hardly an "unforeseeable" event, but is instead exactly the type of risk that a bonding company assumes and insures against to guarantee the defendant's appearance in court. See Ohayon, 467 N.E.2d at 911 ("The escape of a defendant is the business risk of a bail surety.") In the case at hand, Mr. Harris had a history of disappearing, as he failed to appear for at least four court appearances and for a sheriff's work program. R. 2, 4-5, 44, 77-78, 95-96, 103-04. His act of leaving the jurisdiction was not "unforeseeable."

To the extent Two Jinn is arguing that "an essential component of its performance is the state's continued desire to prosecute the defendant," Two Jinn similarly cannot demonstrate that this "was a basic assumption of the [bond] agreement." Appellant's Brief, pg. 13; Chacon, 146 Idaho at 523, 198 P.3d at 752. "[I]t would be a very dangerous innovation to require the government to not only see to it that responsible bail is secured, but, in addition, require it to

keep its prosecuting officers in readiness to appear in other and distant jurisdictions to aid the principal in the recognizance to extricate himself from [circumstances] from which alone the latter is to blame." Pelley, 24 S.E.2d at 638. Two Jinn cannot demonstrate that its obligations under the bond agreement were only enforceable so long as the state unequivocally continued to seek prosecution of the defendant, regardless of the circumstances. Regardless, there is no evidence in the record that the state was suddenly not interested in sentencing Mr. Harris on his parole violation; if Mr. Harris were to appear in court, as Two Jinn was required to ensure, the state would undoubtedly be very interested in continuing its prosecution of the defendant. Furthermore, as discussed previously, Two Jinn filed its Motion to Exonerate Bond before the state was even made aware of the fact that Mr. Harris had left Idaho, which undermines its argument that the state somehow failed to pursue extradition within the 180 day period following forfeiture of the bond.[6] See Appellant's Brief, pg. 12.

Another reason why Two Jinn's impossibility defense fails is the fact that the obligation at issue – securing Mr. Harris's appearance in court – is not impossible for **anyone** to perform. "[I]t is the **task itself** which must be impossible – it is not enough that the particular promisor [Two Jinn] is unable to perform the task if it would be possible for a different promisor to perform." Chacon, 146 Idaho at 523, 198 P.3d at 752 (emphasis added). Two Jinn recognizes this requirement of the doctrine of impossibility, but argues that "[a]ny bail agent would be

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[6] Two Jinn argues that "Idaho Criminal Rule 46(g) directs the court to exonerate the bond if the defendant is brought before the court within 180 days following forfeiture. . . . The state had not requested an extraditable warrant that would have permitted Oregon law enforcement to arrest Mr. Harris at Two Jinn's request." Appellant's Brief, pg. 12. Forfeiture of the bond occurred on February 5, 2008. R. 104-05. The state did not become aware of the fact that Mr. Harris had moved to The Dalles, Oregon until Two Jinn filed its Motion to Exonerate Bond on August 1, 2008. Tr. (5/27/09), pg. 9; Appellant's Brief, pg. 8. Not surprisingly, given its lack of knowledge that Mr. Harris had left Idaho, the state "had not requested an extraditable warrant" prior to August 1, 2008. Notably, this was only three days before the expiration of the 180-day period following forfeiture, which would not have allowed sufficient time for extradition within that time period, anyway. See R. 104-05.

similarly unable to perform and, thus, the impossibility was not personal to Two Jinn." Appellant's Brief., pgs. 12-13. The standard is not whether another **bail agent** would be able to perform the task, but whether "it would be possible for a different promisor to perform." Chacon, 146 Idaho at 523, 198 P.3d at 752 (holding that "[Chacon] does not suggest that it was impossible for **anyone** to [perform the obligation under the contract]. Therefore, the doctrine of impossibility does not operate to excuse Chacon's nonperformance.") (emphasis added). The task itself – securing Mr. Harris's appearance in court in Idaho – is not in and of itself impossible for **anyone** to perform.

Two Jinn's argument of impossibility is further undermined because Two Jinn failed to demonstrate that it had taken any steps to request that the prosecuting attorney apply for extradition. See Tr. (5/27/09), pgs. 9-13. "It is not sufficient to show that the performance simply became more difficult or more expensive than anticipated," such as having to take measures to request extradition; "it must have been made **impossible**." Chacon, 146 Idaho at 523, 198 P.3d at 752 (emphasis added).

Finally, Two Jinn's argument fails because the circumstances at issue were created by the voluntary actions of the defendant, Mr. Harris, in fleeing the state, as well as Two Jinn's own actions in failing to prevent Mr. Harris from leaving the jurisdiction. See Curlycan Bail Bonds, Inc. v. State, 933 So.2d 122, 123 (Fla. Ct. App. 2006) (rejecting the bonding company's impossibility defense and holding: "Here, it was also a combination of Fonseca's voluntary action in fleeing to Venezuela and Curlycan's failure to take precautionary action to prevent his leaving the jurisdiction which led to the surety's inability to perform its obligation under the bond. Curlycan is therefore not entitled to be relieved of the monetary obligation it contractually assumed.") The United States Supreme Court has long held that the defense of impossibility is

not available when the surety's obligation is rendered impossible by the acts of the surety or the defendant/principal. Taylor, 83 U.S. at 370. "The principal in the case before us, cannot be allowed to avail himself of an impossibility of performance thus created; and what will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him what he undertook for himself." Id. at 374.

Even in situations where the "impossibility" of extraditing the defendant is more pronounced, courts in various jurisdictions have rejected the argument that performance under a bail bond agreement should be excused by the doctrine of impossibility. In Professional Bail Bonds, Inc. v. State, for example, the Maryland Court of Appeals addressed a situation where the defendant had voluntarily fled to Honduras, which lacked an extradition treaty with the United States. The court nevertheless rejected the impossibility defense, holding:

> We reject appellant's contention that the circuit court should have stricken forfeiture of the bonds because it was impossible to produce the defendants. **The purpose of a bail bond system is to insure that the party accused is present at trial.** Judge Wenner expounded upon the inefficacy of an argument based on impossibility under circumstances wherein the surety has expressly assumed just such a risk. We note that in the typical contract case, the promisor may not rely on the defense of "impossibility" as an excuse for non-performance if the promisor assumed the risk.
>
> **. . . . The defendants voluntarily fled the country. Appellant insured against that flight, and must now suffer the consequence.** . . .
>
> **The escape of a defendant is the business risk of a bail surety. It is precisely the situation which a surety guarantees against.** . . .
>
> . . . In the instant case, . . . [t]he Defendant voluntarily fled the country and did not appear in Court as required. For diplomatic reasons, i.e., lack of an extradition treaty with Honduras, the Defendant cannot be returned to the United States. . . .
>
> This Court finds that . . . the Petitioner in this case "assumed the risk" that the Defendant would not appear at trial. Petitioner's good faith attempts to locate the Defendant are no defense to Petitioner's failure to appear. **It is an insufficient defense that Petitioner is unable to produce the defendant due to the lack of**

an extradition treaty with Honduras when the defendant voluntarily fled the country prior to his initial court appearance date.

Professional Bail Bonds, Inc. v. State, 968 A.2d 1136, 1147-49 (Md. Ct. App. 2009) (some emphasis added) (some emphasis omitted) (internal quotation marks and citations omitted); see also State v. Phayon, 467 N.E.2d 908 (Ohio 1983) (rejecting the surety's petition to have the bond forfeiture stricken despite the fact that the defendant had absconded to Israel and refused to return to Ohio and the fact that the United States declined to press Israel for extradition.)

The Florida Court of Appeals rejected the defense of impossibility where a defendant fled to Georgia and was shot and killed by a law enforcement officer. State v. Sunshine State Bail Bonds, Inc., 967 So.2d 1084, 1084 (Fla. Ct. App. 2007). Despite the defendant's death, the court ordered that the bond forfeiture remain in place, holding that "the doctrine of impossibility of performance does not excuse Sunshine State Bail Bonds of its obligation to take precautionary action to prevent Vilpre from leaving the jurisdiction, even though the actions of a third party prevented it from bringing Vilpre back to the jurisdiction." Id. at 1085.

Many jurisdictions have also held that where a surety cannot secure a defendant's presence in court because the defendant has been incarcerated in another state, the surety nevertheless cannot rely upon the doctrine of impossibility, as the Idaho courts have recognized:

> The first line of authority, that incarceration in another jurisdiction does not provide a valid excuse to avoid bond forfeiture, began with the United States Supreme Court's decision in *Taylor v. Taintor, 83 U.S. 366, 21 L.Ed. 287 (1872)*. In *Taylor,* the Court ruled, "It is the willing act of the [the defendant] which creates the obstacle, and the legal effect is the same as of any other act of his, which puts performance out of his power." *Id. at 370, 21 L.Ed. 287.* Thus, a surety had no claim for avoiding the forfeiture of bond because "what will not avail [the defendant] cannot avail his sureties." *Id. at 374, 21 L.Ed. 287.* More recent cases have followed this line of reasoning. In *State v. Fields,* 137 N.J.Super. 76, 347 A.2d 810 (Ct.App.Div.1975), the New Jersey court stated that the "mere fact that defendant is imprisoned in Florida is not sufficient to relieve the forfeiture in whole or in part, especially if he left New Jersey without permission, or is jailed for a new crime." *Id.,* 347 A.2d at 811. Likewise, an

> Alabama appellate court has held, "The rule is well established that the incarceration in another state of the principal in a bail bond arrangement made in this state does not relieve the sureties on that bond of their obligation to produce the principal at the appointed place and time in Alabama." *Johnson v. State,* 401 So.2d 118, 118-19 (Ala.Civ.App.1981).

Fry, 128 Idaho at 52, 910 P.2d at 166. In Fry, the Idaho Court of Appeals held that incarceration in another state does not automatically lead to exoneration of a bond, but is instead a factor to be considered by the trial court in reaching its discretionary decision whether exoneration is warranted. Id. It logically follows that if something as extreme as incarceration in another state does not lead to automatic exoneration of the bond, then mere voluntary refusal to return from another state and difficulty with extradition similarly do not lead to automatic exoneration on the basis of "impossibility."

The magistrate was well within the bounds of his discretion in concluding that the doctrine of impossibility did not warrant exoneration of the bond under these circumstances.

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IV.

CONCLUSION

The magistrate appropriately exercised his discretion in denying Two Jinn's Motion to Exonerate Bond. Substantial and competent evidence in the record supported the magistrate's findings of fact, and his conclusions of law followed from those findings. Crump, __ P.3d __, 2009 WL 3415745, *1. Accordingly, the State respectfully requests that this Court uphold the district court's affirmation of the magistrate's denial of Two Jinn's Motion to Exonerate Bond. See id.

Respectfully submitted this 5th day of November, 2009.

STATE OF IDAHO
OFFICE OF ATTORNEY GENERAL

By: _____
KARIN D. JONES
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of November, 2009, I served two true and correct copies of the foregoing by causing the copies to be hand delivered, addressed to the following:

Robyn Fyffe
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☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
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_____
KARIN D. JONES
Deputy Attorney General